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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1990

VICTOR KRAMER,
Petitioner,

vs.

JOHN RAVELLA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1

Did the California superior court violate the Due Process Clause of the 14th Amendment by imposing a substantial default judgment against petitioner as a discovery sanction, comprised mostly of punitive damages, "for a failure to do that which it may not have been in [his] power to do," *Societe Internationale v. Rogers*, 357 U.S. 197, 210 (1958), namely, produce documents which he timely and without any contradiction denied that he had in his possession?

Put another way, at what point does the "presumed admission" doctrine of *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909), as approved in *Societe Internationale* become an unconstitutional fiction?

2

Did the default judgment below violate procedural due process inasmuch as the predicate court order compelling discovery did not threaten the default sanction for failing to produce documents, but only if petitioner failed—which he did not—to identify any responsive documents in his possession and assert any objections to their production?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

Petitioner, Victor Kramer,[1] respectfully prays for a writ of certiorari to review the decision of the California Court of Appeal, Sixth Appellate District, affirming a $381,247.50 default judgment against him, including $250,000 as punitive damages, imposed as a discovery sanction.

JURISDICTION

The judgment of the Court of Appeal was entered on August 30, 1990. A timely petition for review by the California Supreme Court was denied by order entered on December 13, 1990. This petition for certiorari is filed within 90 days thereafter.

[1] Petitioner was one of several defendants but the sole appellant below. The other defendants were Microport Systems, Inc., a California corporation, previously known as Microport Software, Inc., and Charles Hickey. Respondent, John Ravella, was the sole plaintiff and respondent below.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) given the two important questions stated at the outset arising under the Due Process Clause of the 14th Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the 14th Amendment:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

California Code of Civil Procedure §§ 2031 and 2033:

§ 2031(k):

The party making the demand may move for an order compelling response to the inspection demand . . . . If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2033. . . .

§ 2033(b):

To the extent authorized by the section governing any particular discovery method . . . ., the court, after notice to any affected party . . . and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process. . . . [¶] (4) The court may impose a terminating sanction by one of the following orders: . . . [¶] (D) An order rendering a judgment by default against that party.

STATEMENT OF THE CASE

1. The Underlying Dispute

The sum and substance of the complaint filed by respondent, John Ravella ("Ravella"), is that he was unable to invest $20,000 in defendant Microport Systems, Inc. ("Microport"). (A-1) Petitioner, Victor Kramer ("Kramer"), then an officer of Micro-

port, agreed to take Ravella's check on July 18, 1986 (A-1) with the caveat that the desired investment was probably unavailable. (A-4) Kramer returned the check in August 1986 because the last Microport shares had already been purchased. (A-4)

Naturally, Ravella claimed at the default prove-up hearing that his $20,000 investment would have shot up in value to the sum of $130,000. (A-3) But he later acknowledged that this supposedly high-flying corporation had "since" gone bankrupt. (RB 6) Indeed, Ravella's attempt to enforce the Kramer judgment by garnishing Microport was met with the response, "Microport Systems does not have any cash. . . ." (C.T. 449)

2. The Litigation Below

Ravella filed this suit on January 6, 1987, in the California Superior Court for Santa Cruz County. (A-1) It primarily sought contractual remedies against Microport to enforce Ravella's alleged right to buy certain Microport shares for $20,000. (C.T. 1-10) It also asserted fraud claims against Kramer and another Microport officer.

A September 1988 trial date was set on July 20, 1987 (A-2) Ravella's first discovery attempt was initiated almost six months later, a request for documents served on Kramer's counsel on December 9, 1987. (Id.)

But Kramer had moved with his family to Australia during the summer, and it was difficult to locate him there because of his extensive traveling. (A-2) Ravella granted several extensions of time for that reason before moving to compel Kramer's compliance with the discovery request. (Id.)

3. The Limited Threat of a Default Sanction

The resulting order compelling discovery (C.T. 121-122) stated that, if defendant Kramer "does not comply with *the first and second parts* of this Order, this Court will enter a terminating sanction which shall be the entry of a default judgment. . . ." (A-2) (Emphasis added) The first part of the order simply required Kramer to "identify by the required verified pleading the documents he will produce in response to Ravella's [demand].

. . ." (C.T. 122) The second part of the order stated that Kramer "has not waived any objection to Ravella's [demand] including the attorney-client privilege and work product doctrine." (Id.)

It was the third part of the order—as to which Kramer was *not* threatened with a default sanction—which directed him to produce any responsive and nonprivileged documents in his possession by April 8, 1988. The fourth part ordered Kramer to pay sanctions without specifying any deadline. (Id.)

4. Petitioner's Timely Response

Upon learning of the foregoing order Kramer promptly responded *in propria persona* to Ravella's counsel by a rapid service letter from Australia dated March 22, 1988. (A-14) (see C.T. 290) Kramer responded to every paragraph of the document request, albeit not in the detail usually provided by counsel nor with a sworn verification. But he plainly stated that he did not have the bulk of the documents, which he believed were still available at Microport's offices in California. He also raised the attorney-client privilege as to several of the documents, and described problems in locating others because of his recent move. Kramer also furnished a current address and invited Ravella's counsel to respond.

Ravella's counsel responded, by letter dated April 15, 1988 (C.T. 296), but he simply quoted from the discovery order and broadly stated that Kramer had not complied with it. In other words, he furnished no information of any utility to Kramer whatsoever.

Kramer promptly responded again, this time by letter of May 11, 1988. (C.T. 298) He implored Ravella's counsel to elaborate. "If this is not addressing your request, or I am not understanding your request, please elaborate and you will receive my full cooperation." The only "elaboration," however, was a virtually fraudulent motion to take his default.

5. The Misleading Motion for Default

Ravella's counsel at that time was Wallace W. Easterling, then an associate in the major San Francisco law firm of Heller,

Ehrman, White & McAuliffe. (C.T. 300) Easterling's brief declaration under penalty of perjury dated May 12, 1988, the sole basis for taking Kramer's default, was materially incomplete and grossly misleading.

First, Easterling simply stated that "Kramer has failed to submit a verified pleading identifying the documents he would produce in response to Ravella's First Demand for Identification and Production of Documents." (C.T. 301) (Quoted at A-8) While this was a narrowly true statement, in context it concealed the fact that Kramer had made several efforts to identify the relevant documents and otherwise comply with the discovery order. Easterling's terse language implied that there had been no response from Kramer at all, whether sufficient or insufficient formally.

Easterling also strengthened that false implication of Kramer's inaction by reporting that he (Easterling) had written to Kramer on April 15, 1988 (C.T. 301). This again was an unconscionably incomplete characterization of the relevant state of affairs. Easterling's failure even to hint that Kramer had written, too, was an outright fraud on the court.

Moreover, Easterling's papers made no factual showing that Kramer actually possessed the documents in question, contrary to Kramer's denials. In fact, the terse language of Easterling's declaration intimated otherwise. And even months later, on Kramer's motion for relief from the default and default judgment, when Easterling was no longer associated with the Heller firm (R.T. 6, line 22), neither Easterling's successor there nor anyone else ever contradicted Kramer's protest that he simply did not have the bulk of the documents demanded of him.

Finally, Easterling's declaration in effect misrepresented the underlying discovery order. Easterling stated as a reason for the default sanction that "Kramer has failed to *produce* those documents in his custody, control or possession requested in Ravella's First Demand . . . . [etc.]" (Id., emphasis added) But the discovery order had clearly provided that a failure to produce documents was not a predicate for a default sanction.

A *subsequent* version of the order did so provide (C.T. 302-303), but it was not entered until May 2, 1988 and not placed into the regular mail by Ravella's counsel until May 12, 1988. (C.T. 305) Kramer could not possibly have received it in Australia when his default was taken on May 13, 1988. (C.T. 412) Yet it was only the May 2nd order that Ravella's counsel later mentioned in requesting the default judgment. (C.T. 422)

6. The Default, Judgment, and Appeal

The trial court nonetheless entered and later refused to vacate Kramer's default and the ensuing default judgment in the amount of $381,247.50. (C.T. 242-243) (A-3) The judgment consisted of $130,000 in compensatory damages for Ravella's hoped-for $20,000 investment in Microport, plus $250,000 in punitive damages and $1247.50 for a previous sanction.

Kramer timely appealed on federal due process (AOB 12) and other grounds to the California Court of Appeal for the Sixth Appellate District but that court affirmed. Its opinion cited the lack of a verification, the lack of a caption, and several other informalities in Kramer's responses. (A-7 to A-8) It also invoked the *Hammond Packing* doctrine, not by name, but as imported into California case law on due process principles. It stated that petitioner's asserted "lack of response may be regarded as acknowledging his defenses lacked evidentiary support." (A-10)

The California Supreme Court denied Kramer's timely petition for a review by order entered on December 13, 1990. (A-13) This petition followed.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted primarily because the *Hammond Packing* issue has broad national import and is subject to sharply conflicting views among the state courts of last resort. The issue of procedural due process is equally important, however, and was decided below contrary to well established Supreme Court precedent.

1

The Hammond Packing Issue

This case squarely raises "an important question of federal law which has not been, but should be, settled by this Court . . . ," Supreme Court Rule 10.1(c), and on which state courts of last resort have disagreed. Rule 10.1(b). Alternatively, depending upon this Court's resolution of the ambiguous phrase "may be regarded" in the opinion below, the lower court "has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c).

The question involves the substantive constitutional limitations on the states' use of default money judgments—*a fortiori* default punitive damages judgments—as discovery sanctions. The seminal case here is *Hammond Packing Co. v. State of Arkansas, supra,* 212 U.S. 322, whose holding was later explained and approved as follows in *Societe Internationale v. Rogers, supra,* 357 U.S. 197, 210:

> [D]ue process was found preserved in Hammond on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence "* * * was but an admission of the want of merit in the asserted defense." [Citation to *Hammond* omitted] But the Court took care to emphasize that the defendant had not been penalized "* * * for a failure to do that which it may not have been in its power to do" . . . .
>
> These two decisions [*Hammond* and *Hovey v. Elliott,* 167 U.S. 409 (1897)] leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond case might well falter under such circumstances.

But under what circumstances may the states permissibly "utilize" such a presumption? That question as applied to the instant case was only partially answered by *Societe Internationale.* First, it was answered there only with respect to the federal

discovery rules and the Fifth Amendment, not state discovery rules and the Fourteenth Amendment. Second, it was answered there only with respect to an extremely narrow and unusual fact situation, where a threat of criminal prosecution had deterred discovery compliance by a foreign corporation which was seeking restoration of property seized under the Trading with the Enemy Act, 50 U.S.C.A. Appendix § 5(b). Finally, there was no element of punitive damages in *Societe Internationale*, let alone such a dominant presence as here.

The *Hammond* presumption surely "falters" *a fortiori* in the instant case if it faltered in *Societe Internationale*. Yet the court below materially relied on such a presumption in rejecting petitioner's due process challenge, stating quite sweepingly that petitioner's conduct "may be regarded" as an admission of a lack of a meritorious defense to the fraud *cum* punitive damages claim against him. Similarly, the Supreme Court of Idaho has broadly held—over a vigorous dissent—that *Hammond* permits the state courts to "create a presumption" whenever they wish to impose a default sanction to back up their "rules to manage their own affairs and achieve the orderly and expeditious disposition of cases." *Sherwood & Roberts, Inc. v. Riplinger*, 650 P.2d 677, 682 (Idaho 1982). This harks all the way back to the punishments condemned by *Hovey v. Elliott, supra*.

Other courts have taken a narrower view of the circumstances under which a *Hammond* presumption is permissible. The supreme courts of Oregon and Pennsylvania, for example, have only permitted such a presumption and a resulting default judgment when the specific discovery resisted by the defendant supported the inference that he *in fact* admitted the relevant claim against him. *Harris v. Harris*, 430 P.2d 993, 995 (Ore. 1967); *Rapoport v. Sirott*, 209 A.2d 421, 424-425 (and fn. 6) (Pa. 1965).

Societe Internationale itself does not resolve this conflict. There, the Court reversed the functional equivalent of a default sanction—the dismissal of an action seeking the restoration of property—because there was a valid defense of a legal inability to comply with the relevant discovery demand. The lower courts had determined that Societe Internationale was resisting discovery only to the extent of a good faith and noncollusive fear of criminal

prosecution in Switzerland if it turned over the documents in question. That, the Court held, in light of "the serious constitutional questions we have noted," 357 U.S at 212, made it imperative to conclude that the relevant discovery rules did not permit the sanction imposed by the district court.

In the instant case, however, it was undisputed that petitioner *physically* could not comply with the discovery demand. Petitioner, otherwise just like the petitioner in *Societe Internationale,* had made a "reasonable showing of an inability to comply" with the discovery order as to the great majority of the documents identified by respondent. First by letter, and later by declaration in his motion to vacate, petitioner stated that he simply did not have the bulk of the requested documents. Yet the opinion below states that he "disobeyed a judicial discovery order to identify *and produce* documents." (Op., p. 1) (emphasis added)

Absent a review and reversal in this Court, Victor Kramer will be punished severely and unconscionably "for a failure to do that which it may not have been in [his] power to do." *Hammond Packing, supra,* 222 U.S. at 347. The very idea of enforcing this punitive-damages laden default judgment against Mr. Kramer's assets is shocking.

We add, given the punitive damages involvement, that such a punishment would be the antithesis of the "traditional common-law approach," *Pacific Mutual Life Insurance Company v. Haslip,* 59 U.S.L.W. 4157, 4160 (1991), and hardly a "procedure firmly rooted in the practices of our people." *Id.* at 4167 (Scalia, J., concurring). This huge sum of noncompensatory money may not lawfully be confiscated from Victor Kramer and his children's future under the guise of an insupportable *Hammond* presumption—more appropriately, a *Hammond* fiction—to the effect that Kramer's repeated protests of inability to turn over documents "may be regarded as acknowledging his defenses lacked evidentiary support." (P. 15)"

The Fourteenth Amendment prohibits deprivations of property through rules that are unduly harsh, oppressive, or fundamentally unfair. *See generally, Cox v. Louisiana* (1965) 379 U.S. 559. Unless the *Hammond Packing* "presumed admission" doctrine is

to be shorn of the limitation explained by *Societe Internationale* as applied to the states in the Fourteenth Amendment, it was plainly impermissible to punish petitioner with *any* default judgment, let alone a default judgment bloated with punitive damages, for failing to turn over documents which were not even shown to be in his possession.

The need for a clear pronouncement by this Court, even a brief one,[2] is further demonstrated by the wide disparity of decisions on when default judgments are constitutionally permissible as discovery sanctions. *See, Rapoport v. Sirott, supra,* 209 A.2d 421 (default judgment reversed); *Harris v. Harris, supra,* 430 P.2d 993 (affirmed); *Hauer v. Christon,* 168 N.W.2d 81 (Wis. 1969) (reversed); *Mitchell v. Watson,* 361 P.2d 744 (Wash. 1961) (reversed); *United Nuclear Corp. v. General Atomic Co.,* 629 P.2d 231 (N.Mex. 1980) (affirmed); *John v. Medical Center Hospital of Vermont,* 394 A.2d 1134 (Vt. 1978) (dismissal of complaint as discovery sanction reversed).

Even in California, *Doe v. Superior Court,* 222 Cal.App.3d 1406 (1990), held that defendant Roman Polanski's "reprehensible, irresponsible, and unlawful absence from this country, and hence his evasion of sentencing in the criminal action, are unrelated to the merits of Doe's civil action," *id.* at 1410, so taking his default on that basis violated the Fourteenth Amendment. Petitioner's lawful and innocent relocation to Australia, however, has brought down upon him an angry "civil" punishment through blindness to his discovery responses and abusive speculation about his motives.

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[2] While a writ of certiorari is surely warranted herein, that is not to say the correct disposition is difficult to fathom. Indeed, it may require no more than a per curiam opinion granting certiorari and reversing as in *National Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639 (1976), wherein the Court made an equally important but relatively straightforward pronouncement about litigation sanctions, albeit on the other side of the equation.

2

The Procedural Due Process Issue

Certiorari should also be granted on the issue of procedural due process in this case, where there has been such an obvious violation that extended comment here is unnecessary. The predicate discovery order carefully refrained from notifying petitioner that he faced a default sanction if he failed to produce any documents. The order only gave warning of that sanction if he failed to *identify* any responsive documents in his possession and assert any objections to their production. Those things he did. The courts below have paid no more attention to the actual scope of the default threat against petitioner than did respondent's attorney in his misleading declarations.

Due warning of such a drastic sanction as a default judgment was clearly required. *See, e.g., Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Sherwood & Roberts, Inc. v. Riplinger, supra,* 650 P.2d 677, 680; *and see, Greenup v. Rodman,* 42 C.3d 822, 828 (1986) (default judgment as a discovery sanction may not exceed the *ad damnum* of the plaintiff's complaint). This was especially true given petitioner's residence in Australia.

CONCLUSION

For all the reasons set forth in this petition we respectfully request a grant of certiorari. There is a compelling need for this Court to define and underscore, even summarily (see footnote 2 *ante*), the constitutional limitations on the imposition of default sanctions. The Court should hold that a state's imposition of a punitive default judgment in the circumstances presented below cannot be squared with the Due Process Clause of the Fourteenth Amendment.

BIEN, SUMMERS & DALE

By [s] ELLIOT L. BIEN
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Not To Be Published In Official Reports

In the Court of Appeal of the State of California

Sixth Appellate District

John A. Ravella,
Plaintiff and Respodent,

vs.

Victor Kramer,
Defendant and Appellant.

H005392
(Santa Cruz County
Supr. Ct. No. 100650)

[Filed August 30, 1990]

1. Introduction

Defendant Victor Kramer appeals from the entry of a default judgment against him awarding $381,247.50 to plaintiff John Ravella. Defendant's default was entered because he disobeyed a judicial discovery order to identify and produce documents. He questions the court's application of the Civil Discovery Act of 1986.[1] Defendant also challenges the court's denial of his motion to set aside his default. For the reasons stated below, we will affirm the judgment as we find no abuse of discretion.

2. Procedure leading to default judgment against defendant

On January 6, 1987, plaintiff filed a verified complaint alleging that defendant had induced plaintiff to pay him $20,000 by intentionally or negligently misrepresenting the plaintiff would receive in exchange a five percent interest in a corporation named Microport ("corporation"). Plaintiff requested compensatory damages amounting to more than $25,000 according to proof and punitive damages over $500,000. Attached to the complaint was a July 18, 1986 receipt for $20,000 signed by defendant as a vice-president of corporation.

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[1] Unspecified statutory references are to the Code of Civil Procedure.

On February 20, 1987, defendant filed a verified answer denying the allegations of the complaint. Defendant acknowledged that plaintiff had paid $20,000, but raised the defenses of estoppel and waiver in that plaintiff was informed that defendant had no authority to make contracts on behalf of corporation.

On July 20, 1987, the matter was set for trial in September 1988. Subsequent unspecified dates are from 1988. On February 5, defendant's counsel filed a motion to withdraw as defendant was not cooperating or paying and had moved to Australia.

On February 19, plaintiff filed a motion to compel defendant to respond to a demand for production of documents. Plaintiff's counsel declared that he had served defendant's counsel with the demand on December 9, 1987 and had granted defendant two requested extensions of time to provide a response. The last deadline, February 5, passed without a response. The demand asked defendant to document his involvement and communications with plaintiff and corporation.

Defendant's counsel, though seeking to withdraw, opposed sanctioning defendant because he was out of touch with his attorneys and apparently out of the country. At a hearing on March 9, the court granted plaintiff's motion and ordered defendant to identify by verified pleading the documents he would be producing and to produce the documents by April 8. The court ordered sanctions of $1,247.50 and further, that if defendant "does not comply with the first and second parts of this Order, this Court will enter a terminating sanction which shall be the entry of a default judgment against [defendant]." The order provided that defendant had not waived any objections to plaintiff's demand.

On March 30, defendant substituted himself in propria persona for prior counsel and provided an Australian address.

On May 17, plaintiff requested entry of defendant's default pursuant to the prior court order. Plaintiff's counsel declared that defendant had failed to produce docuemnts or even identify them in a verified pleading. Defendant's default was entered the same day.

On July 12, plaintiff requested entry of a default judgment in the amount of $631,247.50 against defendant. In addition to the amount previously awarded as sanctions, plaintiff requested punitive damages of $500,000 and $130,000 representing the value of the stock he paid for. Plaintiff produced evidence that defendant was employed by corporation between May 1986 and October 1987 at an annual salary of $85,000, defendant received $135,000 for selling controlling shares of Microport International to corporation, and defendant received about $185,000 more from corporation for arranging international distribution of its products. At a hearing on August 19, with defendant represented by new counsel, the court granted plaintiff a judgment in the amount of $381,247.50, halving plaintiff's request for punitive damages.

3. Defendant's motion to vacate the default judgment

On November 30, defendant filed a motion to vacate the default judgment against him. He explained his noncompliance with discovery as follows. In mid-1987, he relocated his family to Australia. This required a great deal of traveling, so he was out of touch with his attorneys. He had no fixed address until February.

Defendant did receive copies of the request to produce documents and the order compelling him to do so. He attempted to comply by mailing a four-page letter to plaintiff's counsel on March 22. In the letter, he claimed to have virtually no responsive documents and objected to two requests as overbroad. He said there were some documents that "are a work product between attorneys and myself which I understand are priveleged [*sic*] and protected." He was unable to locate notes of telephone conversations with plaintiff. Other documents were presumably in corporation's possession. He said he was sending a copy of the letter to the court. The letter was not executed under penalty of perjury. Defendant claims not to have understood what it meant to verify his response.

Plaintiff's counsel replied by letter dated April 15, advising defendant that plaintiff would be seeking hi. default because he had produced neither a verified pleading identifying documents nor the documents themselves. On May 11, defendant wrote

back, claiming to have complied as best he was able and asking for further direction.

When defendant received notice of plaintiff's request to enter default, he wrote a letter dated July 29 to the judge who had ordered him to comply with discovery. Defendant denied any wrongdoing and asked how to comply with the court's orders and how to challenge any judgment against him.

Defendant's new counsel declared he was retained by defendant in mid-August. He appeared opposing plaintiff's request for a default judgment, though he was unable to prepare written opposition. He prepared the motion to vacate as diligently as he could, considering the difficulty of communicating with defendant in Australia.

On the merits of the case, defendant declared that plaintiff had distorted the facts. He had told plaintiff he was asked to be an officer and director of corportion, but not that he already was either one. He admitted he was handling potential investors in corporation, but denied being authorized to make contracts on its behalf. By the time plaintiff tendered his check for $20,000, defendant told him it was probably too late, as another investor had contributed all that was needed. Defendant took the check and signed the receipt as a favor to plaintiff, who knew defendant was not yet a vice-president of corporation. He did tell plaintiff that stock certificates were being issued, but also told him that none would be issued to him. He returned plaintiff's check to him in August, 1986, saying his investment had been declined.

Plaintiff opposed defendant's motion to vacate and the court denied it at a hearing on December 19. The court orally observed: "Well, I have to say that I don't really find this case close. Taking all of [defendant's] actions or perhaps incactions into consideration and looking at the history of this case and the efforts that plaintiffs have made to get this matter tried, and on virtually every level, and at every point they have been frustrated in their inability to do so by a person who claims that he doesn't know what 'verified' means and the compliance or lack of compliance with orders. . . . He had a chance to get lawyers. I would venture to say he's probably retained lawyers with some frequency over

his life, and to no small extent I see him as a manipulator of the system, and I'm going to deny the request for the relief."

Other facts are stated where relevant.

4. The discovery statute

Effective July 1, 1987, the Legislature extensively revised discovery procedure by enacting the Civil Discovery Act of 1986. (§ 2016, subd. (a)); Stats. 1986, ch. 1334, § 3, p. 4743; Stats. 1987, ch. 86, §§ 20, 21, p. .) Section 2031 of that Act contains the following pertinent provisions. "Any party may obtain discovery ... by inspecting documents ... that are in the possession, custody, or control of any other party to the action." (Subd. (a).) "In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party." (Subd. (c).) "A party may demand that any other party produce and permit the party making the demand ... to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made." (Subd. (a)(1).) The demandee may promptly seek a protective order. (Subd. (e).)

"The party to whom an inspection demand has been directed shall respond separately to each item or category of item by a statement that the party will comply with the particular demand for inspection and any related activities, a representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item, or an objection to the particular demand." (Subd. (f).)

"A representation of inability to comply with the particular demand of inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or

believed by that party to have possession, custody, or control of the item or category of item." (Subd. (f)(2).)

"If only part of an item or category of item in an inspection demand is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category. If the responding party objects to the demand for inspection of an item or category of item, the response shall (A) identify with particularly any document . . . falling within any category of item in the demand to which an objection is being made, and (B) set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Section 2018, that claim shall be expressly asserted." (Subd. (f)(3).)

"The party to whom the demand for inspection is directed shall sign the response under oath unless the response contains only objections." (Subd. (g).) The response shall be served within twenty days after service of the demand for inspection (subd. (h)), which time can be extended by an agreement confirmed in writing (subd. (i)).

"If a party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand . . . . However, the court, on motion, may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

"The party making the demand may move for an order compelling response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party . . . who unsuccessfully makes or opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make

those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023." (Subd. (k).)

Section 2023 contains the following relevant provisions. "(a) Misuses of the discovery process include, but are not limited to, the following: . . . [¶] 4) Failing to respond or to submit to an authorized method of discovery. . . . [¶] (7) Disobeying a court order to provide discovery.

"(b) To the extent authorized by the section governing any particular discovery method . . ., the court, after notice to any affected party . . . and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process. . . . [¶] (4) The court may impose a terminating sanction by one of the follwing orders: . . . [¶] (D) An order rendering a judgment by default against that party."

5. Validity of entry of the default judgment

The detailed statutory provisions just quoted authorized entry of a default judgment against a party who disobeys a court order to provide discovery. Defendant claims he was not disobedient; he essentially complied with the order to indentify the documents he would be producing by verified pleading and to produce them by April 8, 1988.

It does not appear that defendant's handwritten letter dated March 22, 1988, was before the court when the default judgment was entered, although defendant claimed to have mailed the court a copy. Had it been, it does not substantially comply with the statutory requirements for a response to a demand for production of documents.

Defendant concedes there is no verification. He asserts, however, none was needed for his objections. While the current statute requires verification of a response unless it "contains only objections" (§ 2031, subd. (g)), its predecessor (containing different language) had been interpreted as not requiring verification

to avoid waiving objections in a hybrid response that contains more than the objections. (*Blue Ridge Ins. Co. v. Superior Court* (1988) 202 Cal.App.3d 339, 344-345.) In dictum, that opinion gave the current statute the same interpretation. (*Ibid.*) Whether or not this dictum is valid, it does not alter the requirement of verification of those parts of a hybrid response that are not objections.

Moreover, defendant's letter is defective as a response under section 2031 in other ways. It lacks a caption (subd. (c)), an affirmation of diligent search for missing documents (subd. (f)(2)), and specific identification of the documents subject to objections (subd. (f)(3)).

Defendant challenges as false the declarations by plaintiff's counsel in support of entering defendant's default that defendant "has failed to submit a verified pleading identifying documents he would produce" and "has failed to produce those documents in his custody, control or possession requested" in plaintiff's demand. Both these statements were true. Defendant's letter was not a verified pleading and he objected to producing those documents that were apparently in his possession. Plaintiff's counsel's declaration might have been more forthcoming about defendant's correspondence, but defendant had already claimed he was sending copies to the court. The declaration was not false or misleading. It accurately recited that defendant had not complied with the court's discovery order.

Defendant contends that "even if there was some limited noncompliance with the terms of the court's order, the court abused its discretion in imposing the ultimate sanction of a default judgment for such failure." (Capitalization omitted.) Defendant relies on precedent interpreting the former discovery statute, which authorized rendering a default judgment against a party who "refuses to obey" a discovery order. (Former § 2034, subd. (b)(2); Stats. 1957, ch. 1904, § 3, pp. 3335-3336.) We are persuaded by *Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, that "refuses to obey" meant simple noncompliance and did not connote an element of willfulness. (*Id.* at pp.

882-884, and cases there cited.)[2] In any event, the current statute speaks simply of "fails to obey." This phrase is more clearly intended to not involve courts in questions of willfulness. (*Id.* at p. 883, fn. 6.)

This statutory change does not facilitate imposition of terminating sanctions, however. Constitutional due process limits discovery sanctions that deprive a party of an opportunity of a hearing on the merits. "Due process is violated if the behavior of the defendant will not support the . . . presumption that refusal to provide discovery is an admission of lack of merit in the party's case." (*Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 64.)

"The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne* [1978] 84 Cal.App.3d [771] at p. 793.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (*Ibid.* . . .)" (*Puritan Ins. Co., supra*, 171 Cal.App.3d at p. 885.)

Discovery sanctions that improve a party's position beyond the best possible result of discovery compliance have been regarded as a denial of due process as well as an abuse of discretion. (*Midwife, supra*, 203 Cal.App.3d at pp. 64-65, and cases there cited; *McArthur v. Bockman* (1989) 208 Cal.App.3d 1076, 1080; *Deyo, supra*, 84 Cal.App.3d at pp. 793-798; *Caryl Richards Inc. v. Superior Court* (1961) 188 Cal.App.3d 300, 304-307; cf. *Brown v. Presley of So. California* (1989) 213 Cal.App.3d 612, 620.)

Some cases upholding the ultimate sanction involve repeated disobedience to court orders. (*Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 980-984—defendant's answer was stricken after defendant disobeyed two court orders to answer interrogatories and pay sanctions; *Stein v. Hassen* (1973)

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[2] The former statute also authorized sanctions without disobedience to a court order where a party "willfully fails" to appear at a schedule deposition or to answer interrogatories. (Former § 2034, subd. (d); Stats. 1959, ch. 1590, § 12, p. 3933.)

34 Cal.App.3d 294, 302—defendant's answer was stricken and default was entered after defendant disobeyed two orders to give further answers to interrogatories.) However, other cases authorize the ultimate sanction the first time a party disobeys a discovery order. (*Housing Authority v. Gomez* (1972) 26 Cal.App.3d 366, 371-373—defendant's answer and cross-complaint were stricken and default was entered after nonappearance for two scheduled depositions and a court-ordered deposition; *Flood v. Simpson* (1975) 45 Cal.App.3d 644, 652—defendant's answer was stricken and default was entered after nonappearance for two scheduled depositions and a court-ordered deposition;[3] cf. *Karz v. Karl* (1982) 137 Cal.App.3d 637, 648-651—plaintiff precluded from proving case after disobeying order to provide further answers; see Anno. (1983) 26 A.L.R.4th 849.) Contrary to defendant's contention, "the unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction . . . ." (*Scherrer v. Plaza Marina Coml. Corp.* (1971) 16 Cal.App.3d 520, 524.) Express findings are not essential to support imposition of the ultimate sanction. (Cf. *Deyo, supra,* 84 Cal.App.3d 771, 797.)

Here plaintiff's requests for production of documents essentially asked defendant to document his defenses to plaintiff's claims of misrepresentation. Defendant's lack of response may be regarded as acknowledging his defenses lack evidentiary support. Though he began to represent himself nine days before his court-ordered response was due, "we cannot disregard the applicable principles of law and accord defendant any special treatment because he . . . elected to proceed in propria persona." (*Stein, supra,* 34 Cal.App.3d 294, 303.) A party's absence from the country does not excuse ignoring judicial discovery orders. (Cf. *Housing Authority, supra,* 26 Cal.App.3d 366, 372.)

Defendant has not demonstrated that the court abused its discretion in entering his default or the default judgment. The record does not support his speculation that the court failed to

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[3] *Flood* was not a case, as defendant has it, of disobedience of three court orders.

consider lesser alternatives or intended to punish him or entered his default because he had not paid sanctions.

6. Validity of denial of motion to vacate default judgment

Defendant claims the trial court erred in denying his motion to vacate the judgment under section 473, which provides in pertinent part: "The court may, upon such terms as may be just, relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."[4]

We have already discussed the sufficiency of defendant's response to the court order. Another contention is that he was simply unaware of what a verified pleading was. In *Bank of America v. Salinas Nissan, Inc.* (1989) 207 Cal.App.3d 260, we quoted the following from *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 477. "In *Lohman v. Lohman,* 29 Cal.2d 144, 149 . . . [the Supreme Court] held that 'a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit.' "

A trial court is not required to believe silly excuses because they are uncontradicted. The sophistication revealed in defendant's letters belies his protestation of naiveté. "[A]ny alledged ignorance of legal matters or failure to properly represent himself can hardly constitute 'mistake, inadvertence, surprise or excusable neglect' as those terms are used in section 473." (*Goodson v. The Bogerts, Inc.* (1967) 252 Cal.App.2d 32, 40.)

Defendant appears to have simply walked away from his attorneys and this lawsuit after filing an answer. His attitude toward plaintiff appears to have been "catch me if you can." He does not explain when he received plaintiff's demand for production of documents or the court order to comply. There is also no

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[4] The Legislature expressly imported this standard into section 2031, subdivision (k), for determining whether an untimely response is a waiver of objections. (*City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1467.)

explanation of how he suddenly became able from Australia to retain counsel to oppose entry of a default judgment in August or what sort of subsequent communication difficulties consumed over three more months before defendant moved to vacate the judgment. Defendant ignored the opportunity afforded by the discovery status to present evidence bearing on the merits of his defense. His showing on appeal does not establish that the trial court abused its discretion in denying his motion to vacate the default judgment.

7. Disposition

The judgement is affirmed.

Capaccioli, J.

WE CONCUR:

Agliano, P.J.

Bamattre-Manoukian, J.

Order Denying Review

After Judgment by the Court of Appeal

Sixth Appellate District No. H005392

S017807

In the Supreme Court of the State of California

In Bank

John A. Ravella, Respondent

v.

Victor Kramer, Appellant

Appellant's petition for review DENIED.

LUCAS

Chief Justice

[Handwritten]
Charles N. Freiberg
Wallace W. Easterling
Heller Ehrman, White & McAuliffe
333 Bush Street
San Francisco, CA 94104-2878

March 22, 1988

Re: Case No. 100650 (Ravella v. Kramer)
Demand for Identification and
Production of Documents

Dear Sir,

Berliner, Cohen & Biagini recently contacted me to advise that you have demanded identification and production of documents. Locating me has been a problem for Bob due to the fact that I have been moving around extensively since departing the U.S. last December. My family and I have only just settled although everything is not yet out of cartons, having been locked up in storage for the past few months. As you are aware I have decided not to proceed with BC&B at this time. Therefore I request you send any correspondence directly to me at:

79 Empire Bay Dr.
Daleys Point
New South Wales
Australia 22556

Below is my response to your demand.

Q 1-6. Documents exist that are a work product between attorneys and myself which I understand are priveleged and protected although as far as I am concerned there is nothing there of a secretive or devious nature that you should not have access to. Other than that I have no responsive documents in my possession.

I spoke with a few friends but had no correspondence to or from relating to investment in Microport except for corress-

pondence from Televideo, which was addressed to Microport and not me individually, and the cheque, which Ravella handed to me in an attempt to secure an investment in Microport, which I subsequently returned after a few days after being unsuccessful in securing such investment. The receipt which Revella prepared and had me sign was taken back by him without my making a copy of it.

Q 7. I did take some notes of telephone conversations I had with Ravella after the shock of learning that Ravella had instigated court proceedings several months after his cheque was returned. I am unable to locate these notes at this time. However I am willing to provide them to you when located.

Because of my strong belief that Ravella is greedily and unjustly pursuing this matter I have no desire to keep anything from you and am willing to tell you now the gist of those notes even if you somehow deviously use this to your advantage.

The notes related to my disappointment that he had lowered his integrity and jeopardised our friendship on a frivolous pursuit of attempting to get something for nothing.

Q 8-15. Documents for these requests would normally be with Microport. No responsive documents in my possession.

Q 16. Other than Televideo and Ravella no other documents were created. (See 1-6)

Q 17. This request is too broad. Documents exist between Hickey, Microport and myself which have no relevance to Ravella or this case.

Q 18. Not in my possession.

Q 19. See 17.

Q 20-22. Not in my possession (see 1-6)

I apologize for not being better organized and forgive me for expressing my feelings. But there is something wrong with a system that allows the greedy pursuit of something for nothing (I understand that this case is conducted on a contengency basis) to disrupt a personal life and a business.

The facts are very straight forward in this matter. Ravella had months to invest in Microport. He declined many times. I decided, mortgaged my house, and took the risk. Ravella only changed hs mind after he heard that Televideo may invest. Even though it was too late and I told him so, I nevertheless tried out of friendship to get Ravella involved. Investment was not possible, his cheque was returned. End of story.

Yours sincerely,

V. KRAMER
V. Kramer

March 22, 1988.

P.S. A copy of this is being sent to the Court in case that that is the procedure.